

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

UNITED STATES OF AMERICA, ON  
BEHALF OF THE NATIONAL OCEANIC  
AND ATMOSPHERIC  
ADMINISTRATION AND THE UNITED  
STATES DEPARTMENT OF THE  
INTERIOR; THE STATE OF  
WASHINGTON THROUGH THE  
WASHINGTON DEPARTMENT OF  
ECOLOGY; MUCKLESHOOT INDIAN  
TRIBE; SUQUAMISH TRIBE,

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

No. CV-10-758 RSM

CONSENT DECREE

CONSENT DECREE

U. S. DEPARTMENT OF JUSTICE  
7600 Sand Point Way, NE  
Seattle, WA 98115-0070  
(206) 526-6607

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## I. INTRODUCTION

The United States of America (“United States”), on behalf of the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration (“NOAA”), and the United States Department of the Interior; the State of Washington (the “State”) through the Washington State Department of Ecology; the Suquamish Tribe; and the Muckleshoot Indian Tribe (collectively, “Plaintiffs”), have filed a complaint in this case against defendant The Boeing Company (“Defendant” or “Boeing”) pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9607; the Model Toxics Control Act (“MTCA”), chapter 70.105D RCW; Section 311 of the Clean Water Act (“CWA”), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2702(b)(2)(A) for Covered Natural Resource Damages (as defined below). This Consent Decree (the “Decree”) addresses the claims asserted in the Complaint against the Defendant.

## II. RECITALS

A. The United States Department of Commerce, acting through NOAA; the United States Department of the Interior; the Washington Department of Ecology on behalf of the State of Washington; the Suquamish Tribe, and the Muckleshoot Indian Tribe (collectively, “the Trustees” and, individually, a “Trustee”), under the authority of Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section 1006(b) of OPA, 33 U.S.C. § 2706(b), 40 C.F.R. Part 300, subpart G, and RCW 70.105D.040(2), serve as trustees for natural resources for the assessment and recovery of damages for injury to, destruction of, or loss of natural resources under their trusteeship.

B. Investigations conducted by the Trustees and others have detected hazardous substances in the sediments, soils and groundwater of the Lower

1 Duwamish Waterway, including but not limited to arsenic, antimony, cadmium,  
2 chromium, copper, mercury, nickel, lead, zinc, bis(2 ethylhexyl) phthalate,  
3 hexachlorobenzene, hexachlorobutadiene, polychlorinated biphenyls (PCBs), and  
4 polycyclic aromatic hydrocarbons (PAHs). Overall, the Trustees have  
5 documented the presence of over 30 hazardous substances in the marine  
6 sediments of the Lower Duwamish Waterway.

7 C. The Trustees began assessing damages to natural resources in the  
8 Lower Duwamish Waterway in 1990 by finding that hazardous substances had  
9 been released into the Lower Duwamish Waterway; that natural resources had  
10 likely been injured by the releases; that data sufficient to pursue a natural  
11 resource damage assessment were available or could likely be obtained at a  
12 reasonable cost; and that, without further action, future response activities would  
13 not adequately remedy the resource injuries. *See, e.g.*, NOAA, Lower Duwamish  
14 Waterway Sediment Characterization Study Report (Dec. 10, 1998). Based on  
15 these findings, the Plaintiffs concluded that no further natural resource damage  
16 assessment is required to effectuate the purposes of this Consent Decree, with  
17 respect to Defendant.

18 D. Plaintiffs have filed a complaint (the "Complaint") pursuant to  
19 Section 107 of CERCLA, 42 U.S.C. § 9607; MTCA, chapter 70.105D RCW;  
20 CWA, 33 U.S.C. § 1251 et seq.; and OPA, 33 U.S.C. § 2701 et seq., seeking  
21 recovery from Defendant of damages for injury to, destruction of, and loss of  
22 natural resources resulting from releases of hazardous substances into the Lower  
23 Duwamish Waterway, including the costs of assessing the damages.

24 E. Plaintiffs allege in the Complaint that Defendant owns or in the past  
25 owned and/or operated real property or facilities on, adjacent to, or near the  
26 Lower Duwamish Waterway. Plaintiffs further allege that from each of such  
27 sites identified below by tax parcel number, storm water, surface water runoff,  
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1 wastewater, other process discharges, and/or groundwater have flowed to the  
2 Lower Duwamish Waterway. Plaintiffs also allege that investigations have  
3 detected hazardous substances in soils, groundwater or sediments on or in those  
4 properties or facilities. Some of these hazardous substances are found in the  
5 sediments of the Lower Duwamish Waterway.

6 F. Plaintiffs further allege that hazardous substances have been or are  
7 being released to the Lower Duwamish Waterway from properties or facilities  
8 owned and/or operated by Defendant through direct discharge, surface water  
9 runoff, groundwater and/or seeps, and that those hazardous substances have  
10 caused injury to, destruction of and loss of natural resources in the Lower  
11 Duwamish Waterway under Plaintiffs' trusteeship, including fish, shellfish,  
12 invertebrates, birds, marine sediments, and resources of cultural significance.  
13 Plaintiffs further allege that each of them and the public have suffered the loss of  
14 natural resource services (including ecological services as well as direct and  
15 passive human use losses) as a consequence of those injuries.

16 G. Plaintiffs allege that the Defendant is (a) the owner and/or operator  
17 of one or more facilities; (b) a person who at the time of disposal or release of  
18 any hazardous substance owned or operated any facility at which such hazardous  
19 substances were disposed of; (c) a person who by contract, agreement, or  
20 otherwise arranged for disposal or treatment, or arranged with a transporter for  
21 transport for disposal or treatment, of hazardous substances owned or possessed  
22 by such person, by any other party or entity, or otherwise generated any  
23 hazardous substance disposed of or treated at any facility or incineration vessel  
24 owned or operated by another party or entity and containing such hazardous  
25 substances; and/or (d) a person who accepts or accepted any hazardous  
26 substances for transport to disposal or treatment facilities, incineration vessels or  
27 sites selected by such person from which there is a release or a threatened release  
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1 of a hazardous substance that causes the incurrence of response costs within the  
2 meaning of 42 U.S.C. § 9607 and RCW 70.105D.040.

3 H. Defendant denies all or portions of the allegations of the Complaint,  
4 and all or portions of the allegations contained in Paragraphs E, F, and G, of this  
5 Section.

6 I. Although the Trustees have initiated but not yet completed a natural  
7 resource damage assessment for the Lower Duwamish Waterway, the Trustees  
8 have developed and analyzed information sufficient to support a settlement that  
9 is fair, reasonable and in the public interest.

10 J. In settlement of this action, Defendant has agreed, in lieu of and as  
11 equivalent to monetary damages, to implement the habitat restoration project  
12 described in Appendix A (“Boeing Habitat Project” or the “Project”). Defendant  
13 has also agreed to provide funds to support project implementation costs  
14 expended by the Trustees, to fund the permanent stewardship of the Project Site,  
15 and to reimburse natural resource damage assessment costs incurred by the  
16 Trustees.

17 K. The Project described in Appendix A is to be developed in three  
18 phases. The first phase is the design and initial construction of the project. The  
19 second phase is a ten year period following completion of project construction  
20 during which Defendant is responsible for developing and monitoring vegetation  
21 and habitat at the project site. During this ten-year period, the Defendant may be  
22 required to take a number of active steps to achieve the vegetation and habitat  
23 success criteria for the Project that are presented in Appendix A. The third phase  
24 is an additional twenty-year period during which Defendant is responsible for  
25 maintaining the vegetation and habitat developed during the second phase.  
26 During and after all three phases of the Project, Defendant will take the measures  
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1 needed to ensure that the Project Site remains available for, and dedicated to the  
2 use of, the Project.

3 L. The Trustees have determined that the timely actions and payment  
4 of certain costs to be undertaken by Defendant under this Consent Decree are  
5 appropriate and necessary to protect and restore the natural resources allegedly  
6 injured as a result of alleged actions or omissions of Defendant that are  
7 addressed herein, and that such timely actions and expenditures are adequate to  
8 redress Defendant's responsibility for the Covered Natural Resource Damages  
9 that are the subject of this proceeding.

10 M. Defendant does not admit any liability to Plaintiffs arising out of the  
11 transactions or occurrences alleged in the Complaint and the matters alleged in  
12 this Consent Decree.

13 N. Plaintiffs and Defendant (collectively, the "Parties" and,  
14 individually, a "Party") agree that this Decree addresses the resolution of  
15 Plaintiffs' claims for Covered Natural Resource Damages as defined below, and  
16 that neither Plaintiffs nor Defendant will use this settlement (including the terms  
17 of this Decree and the basis for the compromise contained in other documents  
18 filed in this action in support of this Decree) in any other forum, whether in  
19 litigation, administrative proceedings, formal or informal negotiations, or  
20 otherwise, to resolve, attempt to resolve, or in any way influence the resolution  
21 of, other claims between Plaintiffs and Defendant in the Lower Duwamish  
22 Waterway (as defined below); provided, however, that this provision does not  
23 limit Plaintiffs or Defendant from using otherwise-available factual information  
24 referenced in documents filed in support of this Decree. The restriction in the  
25 preceding sentence applies to, but is not limited to, claims that the United States  
26 (on behalf of the United States Environmental Protection Agency) and the State  
27 may have against Defendant under CERCLA, the Solid Waste Disposal Act (as  
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1 amended by the Resource Conservation and Recovery Act), 42 U.S.C. §§ 6901 et  
2 seq., or MTCA in the Lower Duwamish Waterway (as defined below).

3 O. Plaintiffs and Defendant agree that if Defendant wishes to raise any  
4 concerns with EPA regarding the effect of DSOA Work (as defined below) on the  
5 Project to be constructed by Defendant pursuant to this Consent Decree,  
6 Defendant will raise those concerns solely with the EPA Region that issued the  
7 DSOA Order (as defined below); provided, however, that this provision does not  
8 authorize any disputes under this Decree to be resolved under the dispute  
9 resolution provisions of the DSOA Order.

10 P. Plaintiffs and Defendant agree, and this Court by entering this  
11 Decree finds, that this Decree has been negotiated by the Parties in good faith;  
12 that settlement of this matter will avoid prolonged and complicated litigation  
13 between the Parties; and that this Decree is fair, reasonable, and in the public  
14 interest.

15 NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:

### 16 III. JURISDICTION AND VENUE

17 1. This Court has jurisdiction over the subject matter of this action  
18 pursuant to 28 U.S.C. §§ 1331, 1345 and 1367, 42 U.S.C. § 9613(b), and 33  
19 U.S.C. § 2717(b). The Court has personal jurisdiction over the Parties. Solely for  
20 the purposes of this Decree and the underlying Complaint, the Parties waive all  
21 objections and defenses that they may have to jurisdiction of the Court or to  
22 venue in this District. The Parties may not challenge the terms of this Decree or  
23 this Court's jurisdiction to enter and enforce this Decree.

### 24 IV. PARTIES BOUND

25 2. This Decree is binding upon the United States, the State, the  
26 Suquamish Tribe, the Muckleshoot Indian Tribe, and the Defendant and its heirs,  
27 successors and assigns. Any change in ownership or corporate or other legal  
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1 status, including but not limited to any transfer of assets or real or personal  
 2 property, will in no way alter the status or responsibilities of the Defendant under  
 3 this Decree.

4 3. Defendant shall provide a copy of this Consent Decree to each  
 5 contractor hired by Defendant to perform any of the work required by this  
 6 Consent Decree, and to each person representing Defendant with respect to any  
 7 such work, and shall condition all future contracts entered into by Defendant  
 8 hereunder upon performance of the work in conformity with the terms of this  
 9 Consent Decree. Defendant or its contractors shall provide written notice of the  
 10 Consent Decree to all subcontractors hired by Defendant's contractors to perform  
 11 any portion of the work. Defendant shall nonetheless be responsible for ensuring  
 12 that all work performed by its contractors and subcontractors is performed in  
 13 accordance with this Consent Decree.

#### 14 V. DEFINITIONS

15 4. Unless otherwise expressly provided, terms used in this Decree that  
 16 are defined in CERCLA or in regulations promulgated under CERCLA have the  
 17 meanings assigned to them in CERCLA or in such regulations. Whenever the  
 18 terms listed below are used in this Decree or in any attached appendix, the  
 19 following definitions will apply:

20 a. "CERCLA" means the Comprehensive Environmental  
 21 Response, Compensation, and Liability Act of 1980, as amended, 42 U S C. §  
 22 9601, *et seq.*

23 b. "Consent Decree" or "Decree" means this Consent Decree and  
 24 all attached appendices. In the event of a conflict between this Consent Decree  
 25 and any Appendix, the Consent Decree will control.

26 c. "Covered Natural Resource Damages" means damages,  
 27 including costs of damage assessment, recoverable under Section 107 of  
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1 CERCLA, 42 U.S.C. § 9607; Chapter 70.105D RCW; Section 311 of the Clean  
 2 Water Act (“CWA”), 33 U.S.C. § 1321; and Section 1002 of the Oil Pollution Act  
 3 of 1990 (“OPA”), 33 U.S.C. § 2702(b), for injury to, destruction of, or loss of  
 4 natural resources resulting from releases of hazardous substances or discharges of  
 5 oil to the Lower Duwamish Waterway and/or Elliott Bay, where such release or  
 6 discharge occurred on or before the effective date of this Consent Decree, at the  
 7 following locations: Boeing Developmental Center (tax parcels 0003400018,  
 8 0003400026, 0003400028, 0003400048, 0423049016, 0423049047, 0423049183,  
 9 5624200990, 5624200992, 5624201032, 5624201036, 5624201038); Museum of  
 10 Flight (tax parcel 5624201034); Boeing Thompson Site (tax parcel 0007400033);  
 11 Isaacson Site (tax parcel 0001600014); South Park Site (tax parcels 7883608601,  
 12 7883608603); Boeing Plant 2 (tax parcels 0001600020, 0022000005,  
 13 0022000165, 0022000195, 2185000005, 2824049009, 2924049056, 2924049098,  
 14 2924049112, 3324049002); and Boeing Field (tax parcels 2924049066,  
 15 2924049106). Damages, injury to, destruction of, or loss of natural resources  
 16 resulting from releases of hazardous substances originating from Defendant’s  
 17 operations or activities outside of the tax parcels identified in this sub-paragraph  
 18 are not included in Covered Natural Resource Damages, even if those hazardous  
 19 substances reach the Lower Duwamish Waterway by flowing over, under, or  
 20 through one or more of the tax parcels identified in this sub-paragraph.

21 d. “Day” means a calendar day. In computing any period of time  
 22 under this Consent Decree, where the last day falls on a Saturday, Sunday, or  
 23 federal holiday, the period of time will run until the close of business of the next  
 24 working day. “Working day” means a day other than a Saturday, Sunday, or  
 25 Federal holiday.

26 e. “Defendant” means The Boeing Company.  
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1 f. "DSOA Order" means the Resource Conservation and  
2 Recovery Act Administrative Order on Consent agreed upon by the Defendant  
3 and the U.S. Environmental Protection Agency, EPA Docket No. 1092-01-22-  
4 3008(h).

5 g. "DSOA Work" means the corrective measures being  
6 developed and implemented by Defendant to address the contamination in the  
7 Plant 2 Duwamish Sediments Other Area ("DSOA") pursuant to the DSOA  
8 Order.

9 h. "Elliott Bay" means any portion of Elliott Bay (including the  
10 shoreline, intertidal areas, tributaries, estuaries and bottom sediments) in the State  
11 of Washington where hazardous substances originating from the parcels identified  
12 in the definition of Covered Natural Resource Damages have come to be located.

13 i. "Lower Duwamish Waterway" means any portion of the  
14 Duwamish Waterway (including the shoreline, intertidal areas, tributaries,  
15 estuaries and bottom sediments) in the State of Washington where hazardous  
16 substances originating from the parcels identified in the definition of Covered  
17 Natural Resource Damages have come to be located.

18 j. "Lower Duwamish Waterway Stewardship Account" means  
19 the account to be authorized for receipt of funds to be paid by the Defendant for  
20 the Trustees' permanent stewardship of the Project Site.

21 k. "MTCA" means the Model Toxics Control Act, Chapter  
22 70.105D RCW.

23 l. "Natural Resources" means that definition as provided in 42  
24 U.S.C. § 9601(16).

25 m. "Parties" means the United States, the State of Washington,  
26 the Suquamish Tribe, the Muckleshoot Indian Tribe, and Defendant.

27 n. "Plaintiffs" means the United States, the State, the Suquamish  
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1 Tribe, and the Muckleshoot Indian Tribe.

2 o. "Project" means all of the work and other commitments as  
3 described in Appendix A.

4 p. "Project Site" means the areas outlined in Appendix A.

5 q. "Trustees" mean the United States Department of Commerce,  
6 acting through NOAA; the United States Department of the Interior; the  
7 Washington State Department of Ecology, on behalf of the State of Washington;  
8 the Suquamish Tribe; and the Muckleshoot Indian Tribe.

9 VI. GENERAL PROVISIONS

10 5. The Complaint states claims upon which relief may be granted.

11 6. Nothing in this Consent Decree shall be construed as an admission of  
12 liability by Defendant for any claims or allegations made in the Complaint or in  
13 this Consent Decree.

14 7. This Consent Decree shall not be used as evidence of Defendant's  
15 alleged liability in any action or proceeding other than an action or proceeding to  
16 enforce the terms of this Consent Decree.

17 8. All activities undertaken by Defendant pursuant to this Consent  
18 Decree shall be performed in accordance with the requirements of all applicable  
19 laws and permits.

20 9. Defendant shall ensure that all work performed under this Consent  
21 Decree shall be conducted as set forth in Appendix A attached hereto. If the  
22 Trustees determine that Defendant is not complying with the requirements set  
23 forth in the Decree and Appendix A, the Trustees shall provide prompt written  
24 notice to Defendant specifying the basis for their determination of  
25 noncompliance. Defendant may correct the noncompliance or invoke the dispute  
26 resolution procedures set forth in Section XIV below. The Trustees may require  
27 Defendant to take actions, to alter, suspend or cease ongoing activities, and to  
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1 alter, postpone or refrain from taking proposed actions, as are necessary to ensure  
 2 compliance with the terms of this Consent Decree and any plans or proposals  
 3 adopted hereunder. If Defendant disputes any such requirements imposed by the  
 4 Trustees, the Defendant may invoke the dispute resolution procedures set forth in  
 5 Section XIV below.

6 10. This Consent Decree is not, and shall not be construed to be, a  
 7 permit issued pursuant to any law.

8 11. Where any portion of the activities undertaken pursuant to this  
 9 Consent Decree requires a federal, state or local permit or approval, Defendant  
 10 shall submit timely and complete applications and take all other actions necessary  
 11 to obtain such permits or approvals. The Defendant may seek relief under the  
 12 provisions of Section XVI (Force Majeure) of this Consent Decree for any delay  
 13 in the performance of the Project resulting from a failure to obtain, or a delay in  
 14 obtaining, any permit required for the Project.

15 12. The Plaintiffs do not, by their consent to the entry of this Consent  
 16 Decree, warrant or aver in any manner that Defendant's compliance with this  
 17 Consent Decree will result in compliance with CERCLA or any other law.  
 18 Compliance with this Consent Decree does not diminish or affect Defendant's  
 19 responsibility to comply with any applicable federal, state or local law or  
 20 regulation. The Parties agree that Defendant is responsible for achieving and  
 21 maintaining complete compliance with all applicable federal, state and local laws,  
 22 regulations and permits.

## 23 VII. PROJECT DEVELOPMENT

24 13. Defendant shall finance and construct the Project and shall perform  
 25 any additional activities in accordance with the terms set out in Appendix A.

1 Initial Design and Construction Activities

2 14. Construction Schedule and Contingencies.

3 a. After completion of necessary design work as described in  
4 Appendix A, and after EPA's and the Trustees' approval in writing of such final  
5 design work, Defendant shall commence construction on the Project within ninety  
6 (90) days (subject to the in-water construction work windows) of receiving  
7 written authorization from the Trustees. The Trustees' written authorization will  
8 be provided after: (1) the Trustees verify that the United States Environmental  
9 Protection Agency (EPA) has reviewed and approved Defendant's work plan as  
10 appropriate and consistent with Defendant's DSOA Work as defined in Paragraph  
11 4(g) and Defendant's work as one of the Respondents to EPA's LDW SF Site  
12 remedial investigation/feasibility study (RI/FS) Order, Docket No. CERCLA-10-  
13 2001-0055, and any response action decisions for the LDW SF Site that EPA may  
14 have made, or may or expects to make, that may affect the Project; and (2) other  
15 reviews and determinations by the Trustees, including but not limited to those  
16 identified in the Scope of Work in Appendix A.

17 b. If Defendant has not completed construction of the Project  
18 prior to December 31, 2014, then Defendant shall either (i) pay to the Trustees the  
19 sum of \$250,000 as compensation for the additional delay in restoration of natural  
20 resources, or (ii) perform additional restoration work outside of the Project Site  
21 agreed upon in writing by Defendant and the Trustees. For each subsequent year  
22 in which Defendant has not completed construction of the Project prior to  
23 December 31, Defendant shall either (i) pay to the Trustees the sum of \$250,000  
24 as compensation for the additional delay in restoration of natural resources, or (ii)  
25 perform additional restoration work outside of the Project Site agreed upon in  
26 writing by Defendant and the Trustees. Defendant's obligations under this  
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1 subparagraph are in addition to any other obligations or applicable penalties under  
2 this Decree and are not subject to the provisions of Section XVI (Force Majeure).

3 c. If Defendant has not received from the Trustees written  
4 authorization to commence construction pursuant to Paragraph 14(a) by  
5 December 31, 2017, then the following contingency measures become applicable:

6 (i) The Trustees may request in writing that Defendant  
7 finance and construct a project or projects other than the Project described in  
8 Appendix A, but which in the opinion of the Trustees is equivalent with respect to  
9 ecological function, size, configuration and location as the Project. If Defendant  
10 and Trustees are able to reach an agreement, the Parties may amend this Consent  
11 Decree to substitute a new project or projects for the Project described in  
12 Appendix A.

13 (ii) If the Trustees request a substitute project or projects  
14 under the terms of Paragraph 14(c)(i), and the Trustees and Defendant are unable  
15 to agree upon a substitute project or project, then the Trustees or Defendant may  
16 send written notice that a final impasse among the parties has been reached. In  
17 that event, this Consent Decree (including but not limited to the provisions of  
18 Section XVIII (Plaintiffs' Covenant Not To Sue), Section XX (Defendant's  
19 Covenant Not To Sue), and Section XXI (Effect Of Settlement; Contribution  
20 Protection)) shall become null and void, and Defendant shall have no further  
21 obligations to the Trustees under this Consent Decree; except, however, that in  
22 this event, the provisions of Paragraph 14(c)(iii) shall then become applicable and  
23 shall be the only provisions of this Consent Decree that remain in effect.

24 (iii) In the event that a final impasse is reached under the  
25 provisions of Paragraph 14(c)(ii), the provisions in this Paragraph 14(c)(iii) shall  
26 become applicable and shall survive the termination of the Consent Decree. The  
27 Trustees shall have no obligation to refund any monies that have been paid or  
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1 expended by Defendant pursuant to this Decree (including but not limited to  
 2 monies paid pursuant to Section VII (Project Development), Section X  
 3 (Reimbursement of Restoration Implementation Costs), Section XI  
 4 (Reimbursement of Past Costs), and Section XV (Stipulated Penalties)), nor shall  
 5 Defendant have any right to request or receive any refunds or reimbursements of  
 6 any such monies. In consideration for monies paid by Defendant pursuant to this  
 7 Consent Decree that are not refunded, Plaintiffs covenant not to seek, in any  
 8 future proceeding against Defendant for natural resource damages in the Lower  
 9 Duwamish Waterway or Elliott Bay, natural resource damage assessment costs or  
 10 other costs incurred on or before the last Billing Date that have been paid by  
 11 Defendant pursuant to Paragraph 30 (Reimbursement of Restoration  
 12 Implementation Costs).

13 (iv) The provisions of Paragraph 14(c) are not subject to the  
 14 provisions of Section XIV (Dispute Resolution) of the Consent Decree.

15 15. Within 60 days after completion of construction of the Project,  
 16 Defendant shall submit a written Notice of Completion to the Trustees. The  
 17 Trustees shall review the course and results of the development of the Project to  
 18 determine whether the Project has been completed in accordance with Appendix  
 19 A. Within 60 days after receiving the Notice of Completion, the Trustees shall  
 20 submit to Defendant either (a) a written notice identifying specific deficiencies  
 21 the Trustees determine must be satisfied for the Project to be completed in  
 22 accordance with Appendix A (Notice of Deficiencies); or (b) a written notice of  
 23 the Trustees' determination that the Project has been so completed (Notice of  
 24 Approval of Completion). The date of the Trustees' Notice of Approval of  
 25 Completion shall constitute the "Construction Completion Date." Following  
 26 receipt of a Notice of Deficiencies, Defendant shall correct the identified  
 27 deficiencies and complete the Project in accordance with Appendix A, and submit  
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1 to the Trustees an amended Notice of Completion for review and response in  
 2 accordance with this Paragraph. Any delay in completing Project construction as  
 3 a result of the operation of this Paragraph shall not in and of itself constitute  
 4 grounds for relief from the requirement to pay stipulated penalties under Section  
 5 XV for compliance delays.

6 16. In order to ensure permanent preservation of the Project Site and its  
 7 associated ecological values, within sixty (60) days of the Construction  
 8 Completion Date, Defendant will record, enter into agreements, or otherwise take  
 9 appropriate actions with respect to the Project Site, including its property and  
 10 property owned by the Port of Seattle, to effectuate the provisions set forth in  
 11 Appendix B.

12 Development and Monitoring of Vegetation and Habitat

13 17. Defendant shall develop and monitor vegetation and habitat for a  
 14 period of ten years from the Construction Completion Date, as more fully  
 15 described in Appendix A. Upon completion of the ten-year period, Defendant  
 16 shall provide written Notice of Completion of Vegetation and Habitat  
 17 Development And Monitoring Obligations to Trustees in accordance with Section  
 18 XXIII (Notices and Submissions). Within 45 days after receiving the Notice of  
 19 Completion of Vegetation and Habitat Development And Monitoring Obligations,  
 20 the Trustees shall submit to Defendant either (a) a written notice identifying  
 21 specific deficiencies the Trustees determine must be satisfied for the vegetation  
 22 and habitat development and monitoring obligations to be completed in  
 23 accordance with Appendix A (Notice of Deficiencies); or (b) a written notice of  
 24 the Trustees' determination that the vegetation and habitat development and  
 25 monitoring obligations are completed (Approval of Completion of Vegetation and  
 26 Habitat Development And Monitoring Obligations). The date of the Trustees'  
 27 Approval of Completion of Vegetation and Habitat Development And Monitoring  
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1 Obligations shall constitute the “Vegetation and Habitat Development and  
2 Monitoring Completion Date.”

3 Continued Maintenance of Developed Vegetation and Habitat

4 18. Defendant shall be responsible for maintaining vegetation and other  
5 habitat attributes, for controlling invasive vegetation and debris removal, and for  
6 undertaking corrective actions for any perturbation that affects the ecological  
7 integrity of the Project. The Parties’ intention is that the ecological functions  
8 provided by the habitat projects be maintained in perpetuity. For purposes of this  
9 Decree, Boeing’s responsibility for active maintenance and corrective action shall  
10 extend thirty (30) years from the Construction Completion Date, or sooner if a  
11 “force majeure” event makes further maintenance impossible. Perturbations  
12 include events with a foreseeable probability of occurrence (such as, for example,  
13 the beaching of an abandoned barge) but do not include “force majeure” events.  
14 After the Construction Completion Date, Defendant shall not be responsible for  
15 repairs or corrective actions to the Project required due to any “force majeure”  
16 events.

17 19. Defendant shall provide for continued maintenance and corrective  
18 actions in accordance with Paragraph 18, whether Defendant owns the Project  
19 Site or transfers ownership of the Project Site. The Trustees recognize that the  
20 Project Site may include property that is owned by other parties including, but not  
21 limited to, the Port of Seattle. Defendant recognizes that it is solely responsible  
22 for securing the cooperation of other property owners, including but not limited to  
23 the Port of Seattle, in order to successfully complete and maintain the project in  
24 accordance with Appendix A. Any failure by Defendant to successfully complete  
25 or maintain the project in accordance with Appendix A resulting from disputes  
26 with other property owners, including but not limited to the Port of Seattle, shall  
27 not constitute a “force majeure” event.  
28

1     Transfer of Project Site for Permanent Stewardship

2           20.     Within sixty (60) days of the Construction Completion Date,  
3     Defendant shall ensure, both with respect to the portion of property it owns within  
4     the Project Site and with respect to the portion of the Project Site owned by the  
5     Port of Seattle, that the property will not be used in a manner inconsistent with  
6     the requirements of this Consent Decree. In Defendant's sole discretion, it may  
7     elect to transfer ownership of the portion of the Project Site it owns to an entity to  
8     be identified by the Plaintiffs. If transfer of ownership of Defendant's property  
9     occurs prior to the expiration of Defendant's obligations in Paragraph 18, such  
10    transfer shall not affect or lessen Defendant's obligations under that Paragraph,  
11    and the entity to which any property is transferred shall provide Defendant with  
12    all access necessary to fulfill Defendant's responsibilities under Paragraph 18.

13    General Project Development Provisions

14           21.     Defendant shall avoid taking any action that is inconsistent with this  
15    Consent Decree and that would adversely affect the Project.

16           22.     Defendant shall undertake all activities required to address cultural  
17    resource issues associated with the Project, including, as applicable, consultation  
18    with tribes and the Washington State Department of Archaeology and Historic  
19    Preservation, conducting a background and project review by an archaeologist  
20    who meets the Department of Interior's professional qualification standards at 36  
21    C.F.R. Part 61, conducting cultural resource surveys or monitoring activities.

22           23.     If Defendant determines that the Project will become cost-prohibitive  
23    or if there is some other significant problem that will prevent the Project from  
24    being constructed as designed, other than delay in obtaining EPA approval as set  
25    forth in Paragraph 14(a), then the following contingency measures become  
26    applicable:

1           a. Defendant may propose a project or projects other than the  
2 Project described in Appendix A, but which is equivalent with respect to  
3 ecological function, size, configuration and location as the Project. Such  
4 substitute project shall be subject to approval and acceptance by the Trustees. If  
5 Defendant and Trustees are able to reach an agreement, the Parties may amend  
6 this Consent Decree to substitute a new project or projects for the Project  
7 described in Appendix A.

8           b. If Defendant requests a substitute project or projects under the  
9 terms of Paragraph 23(a) and the Trustees and Defendant are unable to agree  
10 upon a substitute project or project, then the Trustees or Defendant may send  
11 written notice that a final impasse among the parties has been reached. In that  
12 event, this Consent Decree (including but not limited to the provisions of Section  
13 XVIII (Plaintiffs' Covenant Not To Sue), Section XX (Defendant's Covenant Not  
14 To Sue), and Section XXI (Effect Of Settlement; Contribution Protection)) shall  
15 become null and void, and Defendant shall have no further obligations to the  
16 Trustees under this Consent Decree; except, however, that in this event, the  
17 provisions of Paragraph 23(c) shall then become applicable and shall be the only  
18 provisions of this Consent Decree that remain in effect.

19           c. In the event that a final impasse is reached under the  
20 provisions of Paragraph 23(b), the provisions in this Paragraph 23(c) shall  
21 become applicable and shall survive the termination of the Consent Decree. The  
22 Trustees shall have no obligation to refund any monies that have been paid or  
23 expended by Defendant pursuant to this Decree (including but not limited to  
24 monies paid pursuant to Section VII (Project Development), Section X  
25 (Reimbursement of Restoration Implementation Costs), Section XI  
26 (Reimbursement of Past Costs), and Section XV (Stipulated Penalties)), nor shall  
27 Defendant have any right to request or receive any refunds or reimbursements of  
28

1 any such monies. In consideration for monies paid by Defendant pursuant to this  
2 Consent Decree that are not refunded, Plaintiffs covenant not to seek, in any  
3 future proceeding against Defendant for natural resource damages in the Lower  
4 Duwamish Waterway or Elliott Bay, natural resource damage assessment costs or  
5 other costs incurred on or before the last Billing Date that have been paid by  
6 Defendant pursuant to Paragraph 30 (Reimbursement of Restoration  
7 Implementation Costs) or Paragraph 31 (Past Cost Reimbursement).

8 d. A determination by Defendant under the terms of Paragraph  
9 23 that the Project has become cost-prohibitive or that there is some other  
10 significant problem that will prevent the Project as described in Appendix A from  
11 being constructed is subject to the provisions of Section XIV (Dispute  
12 Resolution). The provisions of Paragraphs 23(b) and 23(c) regarding an impasse  
13 between the Defendant and Trustees on a substitute project or projects and  
14 regarding monies paid or expended by Defendant shall not be subject to the  
15 provisions of Section XIV (Dispute Resolution).

16 24. The Trustees reserve the right to conduct additional work  
17 themselves, at their own expense, on the Project Site. If such work is conducted  
18 prior to completion of initial construction by Defendant, the Trustees will conduct  
19 any such work in a manner that does not hinder Defendant's timely completion of  
20 the Project. Prior to performing additional work pursuant to this Consent Decree,  
21 the Trustees shall prepare and provide to Boeing a Health and Safety Plan. In no  
22 event shall the Trustees perform any additional work that will interfere with  
23 Defendant's obligations under this Consent Decree or the construction,  
24 maintenance, operation, or monitoring of the Project or that otherwise affects the  
25 performance criteria of this Consent Decree.

#### 26 VIII. ACCESS TO INFORMATION AND PROJECT SITE

27  
28

1           25. To facilitate their oversight responsibilities, the Trustees shall have  
2 full access to the Project Site for purposes of inspecting or observing Defendant's  
3 progress in implementing the Project required under this Consent Decree.

4           26. Commencing upon the date of lodging of this Consent Decree,  
5 Defendant agrees to provide the Trustees and their contractors access at all  
6 reasonable times to the Project Site and to any property under the control of  
7 Defendant to which access is required for the oversight or implementation of this  
8 Consent Decree. This right of access does not include a right to enter  
9 Defendant's buildings. Where the property to which access is sought is not  
10 otherwise open to public access, the Trustees shall give notice prior to access.  
11 Each Trustee shall have the authority to enter freely and move about such  
12 property at all reasonable times for the purposes of overseeing the requirements  
13 of this Consent Decree, including, but not limited to:

- 14           a. Monitoring and assessing progress on the planning,  
15 development, maintenance and monitoring of the Projects;
- 16           b. Verifying any data or information submitted to the Trustees;
- 17           c. Inspecting and copying records, operation logs, contracts or  
18 other documents maintained or generated by Defendant or its contractors  
19 hereafter retained to perform work undertaken pursuant to this Consent Decree;
- 20           d. Conducting such tests, investigations or sample collections as  
21 deemed necessary to monitor compliance with this Consent Decree, investigate or  
22 assess contamination at or near the Project Site, or to assist in further identifying  
23 and quantifying natural resource injuries requiring restoration actions and in  
24 planning and carrying out further restoration actions.

25           27. Plaintiffs may direct that Defendant use, in a manner consistent with  
26 Defendant's policy on the control of photographic devices, a camera, sound  
27 recording device or other type equipment to record the work done under this  
28



1 Consent Decree or injury to natural resources and provide copies of any such  
2 recordings to the Trustees. Defendant may retain a copy of any such photographs  
3 or video recordings. Trustees may also use their own camera, sound recording  
4 device, or other type equipment to record the work done under this Consent  
5 Decree or injury to natural resources. However, unless Defendant consents,  
6 during any visit to the Project Site the Trustees may not photograph or otherwise  
7 record the interiors of Defendant's buildings or any of Defendant's equipment,  
8 vehicles, machinery, or other devices that have or may have commercial or  
9 defense-related sensitivity.

10 28. Defendant shall have the right to accompany any Trustee or its  
11 representative on the property for purposes of security at the Project Site, and  
12 Trustees and their representatives shall comply with applicable health and safety  
13 precautions and security-related laws. If any Trustee or its representative seeks to  
14 perform duties at the Project Site in a manner that is not in compliance with any  
15 written Project Site health and safety requirement, plan, or rule, or any applicable  
16 federal or state law or promulgated regulation, Defendant may verbally notify  
17 such Trustee or representative of the non-compliance and may further notify such  
18 Trustee of such non-compliance in writing. Defendant shall not be obligated,  
19 pursuant to Section XVII of this Decree, to indemnify anyone for any claims,  
20 damages, or injuries caused by a Trustee's failure to comply with the applicable  
21 health and/or safety requirement, rule, plan, law or regulation, where verbal or  
22 written notice of such noncompliance was provided by Defendant prior to the  
23 performance of actions which caused the claims, damages, or injuries. Defendant  
24 further shall have the right (a) to copies of results of all tests or investigations  
25 conducted by the Trustees pursuant to this Decree; and (b) to split samples taken  
26 by the Trustees pursuant to this Decree. No claim of confidentiality shall be  
27 made with respect to any data, including, but not limited to, all sampling,  
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1 analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or  
 2 any other documents or information evidencing conditions at or around the  
 3 Project Site.

#### 4 IX. SELECTION OF CONTRACTORS

5 29. The selection of any contractor hereafter retained by Defendant to  
 6 perform any of the work required under this Consent Decree shall be subject to  
 7 Trustee approval. Defendant shall notify the Trustees in writing of the name, title  
 8 and qualifications of any contractor Defendant proposes to retain, and of any  
 9 proposed changes in the selection of a contractor. The Trustees will notify  
 10 Defendant in writing of the approval or disapproval of a proposed contractor.  
 11 The Trustees' assent to the proposed selection or change of a contractor may be  
 12 presumed unless the Trustees notify Defendant in writing of their objection to the  
 13 proposed selection or change within 30 days of Defendant's written selection  
 14 notice.

#### 15 X. REIMBURSEMENT OF RESTORATION IMPLEMENTATION COSTS

16 30. Defendant agrees to reimburse the Trustees' reasonable costs  
 17 incurred in implementing and overseeing the Project described in Appendix A to  
 18 this Consent Decree. The period during which the Trustees will incur  
 19 implementation costs begins on June 1, 2009 and ends on the ending date of  
 20 Defendant's responsibility for active maintenance and corrective action, as set  
 21 forth in Paragraph 18. Defendant shall reimburse these costs as follows:

22 a. Each year, beginning in 2010, the Trustees shall provide  
 23 Defendant with an invoice detailing their reasonable costs of implementing and  
 24 overseeing the Project between June 1 of the prior calendar year and May 31 of  
 25 the current calendar year. Within sixty (60) days of receipt of the Trustees'  
 26 invoice, Defendant shall reimburse the Trustees for those costs. If Defendant  
 27 believes that any of the Trustees' invoiced costs are not reasonable, Defendant  
 28

1 may invoke the Dispute Resolution provisions of Section XIV as to the disputed  
 2 costs only; any costs for which Defendant does not invoke Dispute Resolution  
 3 shall be paid within sixty (60) days of receipt of the Trustees' invoice.

4           b. At any time after receipt by Defendant of authorization by the  
 5 Trustees to begin construction of the project pursuant to Paragraph 14(a), the  
 6 Trustees and Defendant will seek to negotiate a lump-sum payment by Defendant  
 7 to the Trustees for the remainder of the Trustees' anticipated implementation  
 8 costs. If Defendant and the Trustees reach agreement on a lump-sum payment,  
 9 then Defendant's obligations to make annual payments of the Trustees reasonable  
 10 implementation and oversight costs pursuant to Paragraph 30(a) shall be fully and  
 11 finally satisfied upon receipt by the Trustees of Defendant's lump-sum payment.  
 12 Such a lump-sum payment shall be made as follows: The Trustees shall petition  
 13 the Court to establish the Lower Duwamish Waterway Implementation Account  
 14 for use as the Trustees shall determine, in accordance with the terms of this  
 15 Consent Decree and other applicable law, to fund the Trustees' implementation  
 16 and oversight of the Project. Payment shall be deposited with the Registry of the  
 17 Court by EFT if the Registry of the Court accepts payment in that form, and if  
 18 not, by certified check, bearing the notation "The Boeing Company –  
 19 Implementation Account" and the civil action number assigned to this Consent  
 20 Decree, made payable and addressed as follows:

21	Payee:	Clerk of the Court
22	Address:	Clerk, U.S. District Court U.S. Courthouse
		700 Stewart Street
		Seattle, WA 98101
23	Memo:	For Deposit into the Lower Duwamish Waterway
24	Implementation Account:	[INSERT THIS CASE DOCKET NUMBER]

XI. PAST COST REIMBURSEMENT

31. Within forty-five (45) days of entry of this Decree, Defendant will pay to the Trustees sums totaling one million nine hundred forty-three thousand one hundred eighty-four dollars and eighty-six cents (\$1,943,184.86) in damage assessment costs through May 31, 2009. These sums shall be paid in the following amounts and particulars:

Trustee: National Oceanic and Atmospheric Administration  
 Amount: One million six hundred eighty-three thousand two hundred thirty-nine dollars and ten cents (\$1,683,239.10)

Trustee: U.S. Department of the Interior  
 Amount: One hundred eighty-four thousand, five hundred seventeen dollars and fifty-nine cents (\$184,517.59)

Payments to NOAA and the U.S. Department of the Interior shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with current EFT procedures. Payment shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit of the U.S. Attorney’s Office of the Western District of Washington. Any payments received by the Department of Justice after 4:00 p.m. Eastern Standard Time shall be credited on the next business day. Defendant shall provide at least five days notice to the Financial Litigation Unit before making the transfer.

Payments to the other Trustees shall be made by certified checks, bearing the notation “The Boeing Company – Lower Duwamish Waterway Assessment Costs” in the amounts indicated and made payable and addressed as follows:

Trustee: State of Washington  
 Amount: Fifty-four thousand two hundred ninety-one dollars and seventeen cents (\$54,291.17)  
 Payee: State of Washington/Department of Ecology  
 Address: State of Washington  
 Department of Ecology  
 Attention: Fiscal Office  
 P.O. Box 47611  
 Lacey, WA 98504-7611

1           Trustee:     Suquamish Tribe  
               Amount:  Twenty-one thousand one hundred thirty-seven dollars  
                              (\$21,137)  
               Payee:     Suquamish Tribe  
               Address:  Melody Allen  
                              Suquamish Tribe  
                              Legal Department  
                              P.O. Box 498  
                              Suquamish, WA 98392-0498

6           32.     At the time of each payment Defendant will send notice that payment  
 7     has been made to the Trustees and DOJ in accordance with Section XXIII  
 8     (Notices and Submissions). Such notice will reference Lower Duwamish  
 9     Waterway NRDA, DOJ case number 90-11-3-7227/1, and the civil action number.

## 11                   XII. FUND FOR PERMANENT STEWARDSHIP OF PROJECT SITE

12           33.     Within forty-five (45) days of receipt from the Trustees of written  
 13     authorization to commence construction of the Project pursuant to Paragraph  
 14     14(a), Defendant shall make a payment in the total amount of three hundred sixty  
 15     thousand dollars (\$360,000) to fund permanent stewardship of the Project. Prior  
 16     to authorizing commencement of construction, the Trustees shall petition the  
 17     Court to establish the Lower Duwamish Waterway Stewardship Account for use  
 18     as the Trustees shall determine, in accordance with the terms of this Consent  
 19     Decree and other applicable law, to permanently maintain and manage the project  
 20     sites, including protection of their ecological values. Payment shall be deposited  
 21     with the Registry of the Court by EFT if the Registry of the Court accepts  
 22     payment in that form, and if not, by certified check, bearing the notation "The  
 23     Boeing Company – Stewardship Account" and the civil action number assigned to  
 24     this Consent Decree, made payable and addressed as follows:

25           Payee:     Clerk of the Court  
               Address:  Clerk, U.S. District Court  
                              U.S. Courthouse  
                              700 Stewart Street  
                              Seattle, WA 98101

1 Memo: For Deposit into the Lower Duwamish Waterway Stewardship  
2 Account [INSERT THIS CASE DOCKET NUMBER]

3 Defendant shall send photocopies of each check and any transmittal letter to:  
4 Chief; Environmental Enforcement Section, Department of Justice, P.O. Box  
5 7611, Ben Franklin Station, Washington, D.C. 20044; and to Laurie Lee, NOAA  
6 Office of General Counsel, 501 W. Ocean Blvd., Suite 4470, Long Beach, CA,  
7 90802. Any funds paid pursuant to this Paragraph that are not utilized by the  
8 Trustees to fund permanent stewardship of the project sites may be applied by the  
9 Trustees toward one or more additional habitat restoration projects in the Lower  
10 Duwamish Waterway.

### 11 XIII. FAILURE TO MAKE TIMELY PAYMENTS

12 34. If Defendant fails to make any payment under Paragraphs 30, 31, or  
13 33 by the required due date, interest shall be assessed at the rate specified for  
14 interest on investments of the EPA Hazardous Substance Superfund established by  
15 26 U.S.C. § 9507, compounded annually on October 1 of each year in accordance  
16 with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in effect at the  
17 time the interest accrues. The rate of interest is subject to change on October 1 of  
18 each year. Interest on late payments shall accrue beginning on the date of entry of  
19 the Consent Decree through the date on which the payment is made.

### 20 XIV. DISPUTE RESOLUTION

21 35. Unless otherwise expressly provided for in this Consent Decree, the  
22 dispute resolution procedures of this Section shall be the exclusive mechanism to  
23 resolve disputes arising under or with respect to this Consent Decree.

24 36. Any dispute which arises under or with respect to this Consent  
25 Decree shall in the first instance be the subject of informal negotiations between  
26 the Trustees and Defendant. The period for informal negotiations shall not exceed  
27 twenty-one (21) days from the time the dispute arises, unless the parties to the  
28 dispute agree otherwise in writing. The dispute shall be considered to have arisen

1 when the Trustees send Defendant a written notice specifying the nature of the  
2 dispute and requested relief ("Notice of Dispute") or Defendant sends the Trustees  
3 a written Notice of Dispute.

4 37. a. If the Parties cannot resolve a dispute by informal negotiations  
5 under the preceding Paragraph, then the position advanced by the Trustees shall  
6 be considered binding unless, within twenty-one (21) days after the conclusion of  
7 the informal negotiation period, Defendant invokes the formal dispute resolution  
8 procedures of this Section by serving on the Trustees a written Statement of  
9 Position on the matter in dispute, including, but not necessarily limited to, any  
10 factual data, analysis or opinion supporting that position and any supporting  
11 documentation relied upon by Defendant.

12 b. Within twenty-one (21) days after receipt of Defendant's  
13 Statement of Position, the Trustees shall serve on Defendant their written  
14 Statement of Position, including, but not necessarily limited to, any factual data,  
15 analysis or opinion supporting that position and all supporting documentation  
16 relied upon by the Trustees.

17 c. An administrative record of the dispute shall be maintained by  
18 the Trustees and shall contain all Statements of Position, including supporting  
19 documentation, submitted pursuant to this Section.

20 d. The Defendant and the Trustees each shall identify a Formal  
21 Dispute Resolution Representative, who shall meet to discuss the matter in dispute  
22 at the earliest available opportunity and who will meet and work in good faith to  
23 resolve the matter in dispute. If the Parties fail to resolve the dispute within  
24 twenty-one (21) days after the initial meeting of the Formal Dispute Resolution  
25 Representatives, then the position advanced by the Trustees in their Statement of  
26 Position shall be considered binding upon Defendant, subject to any agreements  
27 the Formal Dispute Resolution Representatives may have reached on one or more  
28

1 issues. In such event, the Trustees shall within five (5) days of the conclusion of  
2 the formal dispute resolution process notify Defendant in writing that the formal  
3 dispute resolution process has concluded. Defendant may seek judicial review of  
4 the Trustees' Statement of Position (as modified by any agreements the Formal  
5 Dispute Resolution Representatives may have reached) pursuant to the following  
6 Subparagraph.

7 e. Any matter in dispute shall be reviewable by this Court,  
8 provided that a motion for judicial review of the decision is filed by Defendant  
9 with the Court and served on all Parties within twenty-one (21) days of receipt of  
10 the Trustees' letter notifying Defendant of the conclusion of the formal dispute  
11 resolution process. The motion shall include a description of the matter in dispute  
12 (including both Statements of Position), the efforts of the parties to resolve the  
13 dispute, the relief requested, and the schedule, if any, within which the dispute  
14 must be resolved to ensure orderly implementation of this Consent Decree. The  
15 Parties shall jointly move the Court to establish a schedule under which the  
16 Plaintiffs file a response to Defendant's motion within twenty-one (21) days of  
17 receipt of the motion, and Defendant file a reply brief within five (5) business  
18 days of receipt of the response. If the Court does not grant the motion for such a  
19 schedule, then the Parties shall file the response and reply in accordance with the  
20 schedule set forth in the Local Rules for the Western District of Washington.

21 f. The Court may rule based on the administrative record, with or  
22 without oral argument, and shall review Trustees' Statement of Position or its  
23 resolution of the dispute under the standards of Administrative Procedures Act.

24 g. The foregoing notwithstanding, the Parties acknowledge that  
25 disputes may arise that require resolution on an expedited basis. In such cases, the  
26 Parties shall agree on an expedited schedule or, absent prompt agreement, either  
27  
28



1 Defendant or the Trustees may petition the Court for the imposition of an  
2 expedited schedule.

3 38. The invocation of formal dispute resolution procedures under this  
4 Section shall not extend, postpone, or affect in any way any obligation of the  
5 Defendant under this Consent Decree, not directly in dispute, unless the Trustees  
6 or the Court agree otherwise. Stipulated penalties with respect to the disputed  
7 matter shall continue to accrue, but payment otherwise required under Section XV  
8 shall be stayed pending resolution of the dispute. Notwithstanding the stay of  
9 payment, stipulated penalties shall continue to accrue from the first day of  
10 noncompliance with any applicable provision of this Consent Decree. In the event  
11 that the Defendant does not prevail on the disputed issue, stipulated penalties shall  
12 be assessed and paid as provided in Section XV (Stipulated Penalties).

#### 13 XV. STIPULATED PENALTIES

14 39. The Parties stipulate that the time period for implementing the  
15 Project is a significant factor in the settlement reached in this Decree and that  
16 delay in carrying out the activities required in this Decree may diminish the  
17 compensatory value attributable to those activities. Consequently, in the event  
18 that Defendant fails to meet a requirement in this Decree (subject to any  
19 modifications agreed to under Section XXVII) and any delay is not excused  
20 through operation of the provisions of Section XVI (Force Majeure), Defendant  
21 shall, as a stipulated penalty, increase the financial contributions it makes under  
22 this Consent Decree to fund habitat restoration actions, over and above any  
23 payments required elsewhere under this Consent Decree, as follows:

24 a. For each week Defendant fails to comply with any requirement  
25 in the Decree, Defendant shall pay a stipulated penalty in the amount of \$1,000.  
26 Where the delay extends beyond the second week, the stipulated penalty shall  
27 apply to each additional day of delay for each such missed requirement. For  
28



1 purposes of this Subparagraph, a week shall equal a continuous period of seven  
2 days. Nothing in this Decree prevents the simultaneous accrual of separate  
3 penalties for separate violations of this Decree.

4           b. All penalties shall begin to accrue on the day after the  
5 complete performance is due or the day a violation occurs, and shall continue to  
6 accrue through the final day of the correction of the noncompliance or completion  
7 of the activity. Following the Trustees' determination that Defendant has failed  
8 to comply with a requirement of this Consent Decree, the Trustees may give  
9 Defendant written notification of the same and describe the noncompliance. The  
10 Trustees may send the Defendant a written demand for the payment of the  
11 penalties. However, penalties shall accrue as provided in the preceding Paragraph  
12 regardless of whether the Trustees have notified Defendant of a violation.

13           c. All payments to the Trustees under this Paragraph will be  
14 deposited with the Registry of the Court by EFT if the Registry of the Court  
15 accepts payment in that form, and if not, by certified check. This payment will be  
16 deposited in the Lower Duwamish Waterway Account. At the time of each  
17 payment, Defendant will send notice that payment has been made to the Trustees  
18 and DOJ in accordance with Section XXIII (Notices and Submissions). This  
19 notice will reference Lower Duwamish Waterway NRDA, DOJ Case Number 90-  
20 11-3-07227/1, and the civil action number.

21           d. All penalties accruing under this Section shall be due and  
22 payable within 30 days of the Defendant's receipt from the Trustees of a demand  
23 for payment of the penalties, unless Defendant invokes the Dispute Resolution  
24 procedures under Section XIV (Dispute Resolution).

25           e. Defendant may dispute the Trustees' right to the penalties  
26 identified under Subparagraph a above by invoking the procedures of Section XIV  
27 (Dispute Resolution).  
28

1 The payment of penalties shall not alter in any way Defendant's obligation  
2 to complete the performance of the Work required under this Consent Decree.

3 40. Penalties shall continue to accrue as provided in Paragraph 39(b)  
4 during any dispute resolution period, but need not be paid until the following:

5 a. If the dispute is resolved by agreement or by a decision of the  
6 Trustees that is not appealed to this Court, accrued penalties determined to be  
7 owing shall be paid to the Trustees within 15 days of the agreement or the receipt  
8 of the Trustees' decision or order;

9 b. If the dispute is appealed to this Court and the Trustees prevail  
10 in whole or in part, Defendant shall pay all accrued penalties determined by the  
11 Court to be owed to the Trustees within 60 days of receipt of the Court's decision  
12 or order, except as provided in Subparagraph c below;

13 c. If the District Court's decision is appealed by any Party,  
14 Defendant shall pay all accrued penalties determined by the District Court to be  
15 owing to the Trustees into an interest-bearing escrow account within 60 days of  
16 receipt of the Court's decision or order. Penalties shall be paid into this account  
17 as they continue to accrue, at least every 60 days. Within 15 days of receipt of the  
18 final appellate court decision, the escrow agent shall pay the balance of the  
19 account to the Trustees or to Defendant to the extent that they prevail.

20 41. If Defendant fails to pay stipulated penalties when due, the Trustees  
21 may institute proceedings to collect the penalties, as well as interest. Defendant  
22 shall pay Interest on the unpaid balance, which shall begin to accrue on the date of  
23 demand made pursuant to Paragraph 39(d).

24 42. If the Trustees bring a motion or a separate action in court to enforce  
25 this Decree and prevail, the Trustees shall be entitled to recover from the  
26 Defendant their reasonable costs of such motion or action, including but not  
27 limited to costs of attorney time.  
28

43. Payments made under this Section are in addition to any other remedies or sanctions available to Plaintiffs by virtue of Defendant's failure to comply with the requirements of this Decree.

44. Notwithstanding any other provision of this Section, Plaintiffs may, in their unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Decree. Payment of stipulated penalties does not excuse Defendant from payment as required by Sections VII, X, XI, or XII or from performance of any other requirement of this Consent Decree.

45. The Trustees may use sums paid as stipulated penalties under Paragraph 39 to pay unreimbursed damage assessment costs and to fund or contribute to additional actions to restore Lower Duwamish Waterway natural resources.

## XVI. FORCE MAJEURE

46. “Force majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant (including Defendant’s contractors and sub-contractors, and any other entity controlled by Defendant) that delays or prevents the performance of any obligation under this Consent Decree despite Defendant’s best efforts to fulfill the obligation. The requirement that Defendant exercises “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure event and use best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. “Force majeure” does not include financial inability to fulfill the obligation. The requirement that Defendant exercises “best efforts to fulfill the obligation” also includes, where necessary, the filing of legal actions to compel contract performance in accordance with the design and schedule approved by the Trustees herein.

1           47.    a.     If any event occurs or has occurred that may delay the  
2 performance of any obligation under this Consent Decree, whether or not caused  
3 by a force majeure event, Defendant shall notify the Trustees within 14 days of  
4 when Defendant first knew that the event might cause a delay. Within 30 days  
5 thereafter, Defendant shall provide a written explanation and description of the  
6 reasons for the delay; the anticipated duration of the delay; all actions taken or to  
7 be taken to prevent or minimize the delay; a schedule for implementation of any  
8 measures to be taken to prevent or mitigate the delay or the effect of the delay;  
9 and the rationale for attributing such delay to a force majeure event (if Defendant  
10 intends to assert such a claim). Defendant shall include with any notice all  
11 available documentation supporting its claim that the delay was attributable to a  
12 force majeure event. Failure to comply with the above requirements will preclude  
13 Defendant from asserting any claim of force majeure for that event.

14           b.     If the Trustees agree that the delay or anticipated delay is  
15 attributable to a force majeure event, the time for performance of the obligations  
16 under this Consent Decree that are affected by the force majeure event will be  
17 extended by the Trustees for such time as is necessary. An extension of the time  
18 for performance of the obligations affected by the force majeure event shall not, of  
19 itself, extend the time for performance of any other obligation. If the Trustees do  
20 not agree that the delay or anticipated delay has been or will be caused by a force  
21 majeure event, the Trustees will notify Defendant in writing of their decision.

22           c.     If Defendant elects to invoke the dispute resolution procedures  
23 set forth in Section XIV, above, regarding a claimed force majeure event it shall  
24 do so no later than 30 days after receipt of the Trustees' notice of disagreement.  
25 In any such proceeding Defendant shall have the burden of demonstrating by a  
26 preponderance of the evidence that the delay or anticipated delay has been or will  
27 likely be caused by a force majeure event, that the duration of the delay or the  
28

1 extension sought was or will be warranted under the circumstances, that  
2 Defendant exercised best efforts to fulfill the obligation in question, that best  
3 efforts were exercised to avoid and mitigate the effects of the delay, and that  
4 Defendant complied with the requirements of this Paragraph. If Defendant carries  
5 this burden, the delay at issue shall be deemed not to be a violation by Defendant  
6 of the affected obligation of this Consent Decree.

#### 7 XVII. INDEMNIFICATION; INSURANCE

8 48. a. Plaintiffs do not assume any liability by entering into this  
9 Consent Decree. Defendant shall indemnify and hold harmless each of the  
10 Plaintiffs and/or their agents, employees and representatives from any and all  
11 damage claims or causes of action arising from negligent or other wrongful acts or  
12 omissions of Defendant and/or its officers, employees, agents, contractors,  
13 subcontractors, representatives and any persons acting on its behalf or under its  
14 control in carrying out activities pursuant to this Consent Decree. Further,  
15 Defendant agrees to pay the Plaintiffs all reasonable costs they incur, including  
16 but not limited to attorneys fees and other expenses of litigation and settlement,  
17 arising from or on account of claims made against the Plaintiffs based on  
18 negligent or other wrongful acts or omissions of Defendant or its officers,  
19 employees, agents, contractors, subcontractors, representatives and any persons  
20 acting on its behalf or under its control, in carrying out activities pursuant to this  
21 Consent Decree. None of the Plaintiffs shall be held out as a party to any contract  
22 entered into by or on behalf of Defendant in carrying out activities pursuant to this  
23 Consent Decree. Neither Defendant nor any contractor or representative of  
24 Defendant shall be considered an agent of any Plaintiff, and Defendant shall  
25 require any contractor hereafter retained by Defendant who performs work for  
26 Defendant in carrying out activities pursuant to this Consent Decree to  
27 affirmatively acknowledge that it is not acting as an agent of any Plaintiff.  
28

1           b.     Plaintiffs shall give Defendant written notice of any claim for  
2     which one or more Plaintiff plans to seek indemnification pursuant to Paragraph  
3     48(a), and shall consult with Defendant (including, but not limited to, responding  
4     to Defendant's reasonable requests for information regarding any proposed  
5     settlement of that claim) prior to settling such claim.

6           49.    Defendant waives all claims against Plaintiffs for damages or  
7     reimbursement or for set-off of any payments made or to be made to Plaintiffs,  
8     arising from or on account of any contract, agreement, or arrangement between  
9     Defendant and any person for performance of activities pursuant to this Consent  
10    Decree, including, but not limited to, claims on account of construction delays. In  
11    addition, Defendant shall indemnify and hold harmless Plaintiffs with respect to  
12    any and all claims for damages or reimbursement arising from or on account of  
13    any contract, agreement, or arrangement between any Defendant and any person  
14    for performance of activities pursuant to this Consent Decree, including, but not  
15    limited to, claims on account of construction delays.

16          50.    No later than 15 days before commencing any work on the Project  
17    Site, Defendant shall cause to be maintained comprehensive general liability  
18    insurance and automobile liability insurance with limits of \$10,000,000 (ten  
19    million dollars), combined single limit. The Trustees shall be named additional  
20    insureds on any such policies with respect to all liability arising out of the  
21    activities performed by or on behalf of Defendant pursuant to this Consent  
22    Decree. In addition, for the duration of this Consent Decree Defendant shall  
23    satisfy, or shall ensure that their contractors or subcontractors satisfy, all  
24    applicable laws and regulations regarding the provision of worker's compensation  
25    insurance for all persons performing any work involved in implementing this  
26    Consent Decree. No later than 15 days before commencing any work involved in  
27    implementing this Consent Decree, Defendant shall provide to the Trustees  
28

1 certificates of such insurance. Upon request, the United States Department of  
 2 Justice may examine any such insurance policies at Defendant's corporate  
 3 headquarters in Chicago, Illinois, for the limited purpose of verifying that such  
 4 insurance policies provide the coverage required by this Consent Decree. The  
 5 Department of Justice will not copy the insurance policies during its review;  
 6 however, in the event of a dispute regarding the adequacy of such insurance  
 7 policies, Defendant will provide a confidential copy of the disputed policies to the  
 8 Court and to the Department of Justice. Following the resolution of any such  
 9 dispute, the copies provided will be destroyed or returned to Defendant.  
 10 Defendant shall resubmit such certificates each year on the anniversary of the  
 11 effective date of this Consent Decree. If Defendant demonstrates by evidence  
 12 satisfactory to the Trustees that any contractor or subcontractor maintains  
 13 insurance equivalent to that described above, or insurance covering the same risks  
 14 but in a lesser amount, then, with respect to that contractor or subcontractor,  
 15 Defendant need provide only that portion of the insurance described above that is  
 16 not maintained by the contractor or subcontractor.

#### 17 XVIII. COVENANT NOT TO SUE BY PLAINTIFFS

18 51. Except as specifically provided in Section XIX (Reservations of  
 19 Rights) below, Plaintiffs covenant not to sue or to take administrative action  
 20 against Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a);  
 21 Chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. §  
 22 1321; or Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §  
 23 2702(a), to recover Covered Natural Resource Damages. This covenant not to sue  
 24 will take effect upon Defendant's complete payment of costs pursuant to Section  
 25 X (Reimbursement of Restoration Oversight Costs), Section XI (Reimbursement  
 26 of Past Costs), and Section XII (Fund for Permanent Stewardship of Project Site)  
 27 and continue in effect conditioned upon the satisfactory performance by  
 28



1 Defendant of its obligations under this Consent Decree. This covenant not to sue  
 2 extends only to Defendant and its heirs, successors and assigns, and does not  
 3 extend to any other person.

#### 4 XIX. RESERVATIONS OF RIGHTS

5 52. Plaintiffs reserve, and this Consent Decree is without prejudice to, all  
 6 rights against Defendant with respect to all matters not expressly included within  
 7 the Covenant Not to Sue by Plaintiffs in Paragraph 51. Notwithstanding any other  
 8 provision of this Consent Decree, the Plaintiffs reserve all rights against  
 9 Defendant with respect to:

- 10 a. liability for costs of response incurred or to be incurred by  
 11 Plaintiffs under any federal or State statute;
- 12 b. liability for damages to natural resources (including  
 13 assessment costs) as defined 42 U.S.C. §§ 9601(6 & 16) that are not expressly  
 14 included within the Covenant Not to Sue by Plaintiffs in Paragraph 51;
- 15 c. liability for damages to natural resources (including  
 16 assessment costs) as defined 42 U.S.C. §§ 9601(6 & 16) within the Lower  
 17 Duwamish Waterway or Elliott Bay resulting from new releases of Waste Material  
 18 from Defendant's operations after the effective date of this Consent Decree, or  
 19 resulting from the Defendant's transportation, treatment, storage, or disposal, or  
 20 the arrangement for the transportation, treatment, storage, or disposal of Waste  
 21 Material at or in connection with the Site, after signature of this Consent Decree;
- 22 d. liability for injunctive relief or administrative order  
 23 enforcement under any federal or State statute;
- 24 e. liability for costs incurred or to be incurred by the Agency for  
 25 Toxic Substances and Disease Registry in or regarding the Lower Duwamish  
 26 Waterway or Elliott Bay;



f. additional claims for Covered Natural Resource Damages if conditions, factors or information in the Lower Duwamish Waterway or Elliott Bay, not known to the Trustees as of the effective date, are discovered that, together with any other relevant information, indicate that there is a threat to the environment, or injury to, destruction of, or loss of natural resources of a type unknown, or of a magnitude significantly greater than was known, at the time of entry of this Consent Decree, which is attributable to the Defendant (for purposes of this Subparagraph, information known to the Trustees shall consist of any information in the files of, or otherwise in the possession of, any one of the individual Trustees, or their contractors or consultants who worked on the Trustees' natural resource damages assessment and liability allocation projects);

g. criminal liability to the United States or State; and

h. claims in this action or in a new action based on a failure of the Defendant to satisfy the requirements of this Consent Decree.

## XX. COVENANT NOT TO SUE BY DEFENDANT

53. Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, the State, the Suquamish Tribe, and the Muckleshoot Indian Tribe, or their contractors or employees, relating to Covered Natural Resource Damages. Defendant reserves, and this Consent Decree is without prejudice to, all rights with respect to all matters not expressly included within this Covenant Not to Sue, including all rights with respect to all matters reserved in Section XIX.

## XXI. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

54. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Each of

1 the Parties expressly reserves any and all rights (including, but not limited to, any  
2 right to contribution), defenses, claims, demands, and causes of action they each  
3 may have with respect to any matter, transaction, or occurrence relating in any  
4 way to the Lower Duwamish Waterway against any person not a Party hereto.  
5 Nothing in this Consent Decree diminishes the right of the United States, pursuant  
6 to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue  
7 any such persons to obtain additional relief (including response action, response  
8 costs, and natural resource damages) and to enter into settlements that give rise to  
9 contribution protection pursuant to Section 113(f)(2).

10 55. The Parties agree, and by entering this Consent Decree this Court  
11 finds, that this settlement constitutes a judicially-approved settlement for purposes  
12 of Section 113(f)(2), and that Defendant is entitled, as of the effective date of this  
13 Consent Decree, to protection from contribution actions or claims as provided by  
14 CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and RCW 70.105D.040(4)(d),  
15 or as may be otherwise provided by law, for Covered Natural Resource Damages;  
16 provided, however, that if the Plaintiffs exercise their rights under the reservations  
17 in Section XIX, other than in Paragraphs 52(g) (criminal liability) and 52(h)  
18 (failure to satisfy a requirement of this Consent Decree), the contribution  
19 protection afforded by this Consent Decree will no longer include those matters  
20 that are within the scope of the exercised reservation.

21 56. Defendant agrees that it will notify the Trustees and the United States  
22 in writing no later than 60 days before bringing a suit or claim for contribution for  
23 Covered Natural Resource Damages. Defendant also will notify the Trustees of  
24 any settlement of its claims (regardless of whether the claim is filed or unfiled) for  
25 contribution for Covered Natural Resource Damages. Defendant also agrees that  
26 it will notify the Trustees and the United States in writing within 10 days of  
27 service of a complaint or claim upon Defendant relating to a suit or claim for  
28

1 contribution for Covered Natural Resource Damages. In addition, Defendant will  
 2 notify the Trustees and the United States within 10 days of service or receipt of  
 3 any Motion for Summary Judgment and within 10 days of receipt of any order  
 4 from a court setting a case for trial for matters related to this Decree.

5 57. In any subsequent administrative or judicial proceeding initiated by  
 6 the Plaintiffs for injunctive relief, recovery of response costs, or other appropriate  
 7 relief other than Covered Natural Resource Damages, Defendant shall not assert,  
 8 nor may it maintain, any defense or claim based upon the principles of waiver, res  
 9 judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses  
 10 based upon any contention that the claims raised by the Plaintiffs in the  
 11 subsequent proceeding were or should have been brought in the instant case;  
 12 provided, however, that nothing in this Paragraph affects the enforceability of the  
 13 covenants not to sue set forth in Paragraphs 51 and 53.

## 14 XXII. RETENTION OF RECORDS

15 58. Until 10 years after the Defendant's receipt of the Trustees'  
 16 notification pursuant to Paragraph 15, Defendant shall preserve and retain all non-  
 17 identical copies of records and documents (including records or documents in  
 18 electronic form) now in its possession or control or which come into its possession  
 19 or control that relate in any manner to its liability under CERCLA with respect to  
 20 the Lower Duwamish Waterway. Defendant must also retain, and instruct its  
 21 contractors and agents to preserve, for the same period of time specified above all  
 22 non-identical copies of the last draft or final version of any documents or records  
 23 (including documents or records in electronic form) now in its possession or  
 24 control or which come into its possession or control that relate in any manner to  
 25 the performance of the Project, provided, however, that Defendant (and its  
 26 contractors and agents) must retain, in addition, copies of all data generated during  
 27 the performance of the Work and not contained in the aforementioned documents  
 28

1 required to be retained. Each of the above record retention requirements shall  
 2 apply regardless of any corporate retention policy to the contrary.

3 59. At the conclusion of this document retention period, Defendant shall  
 4 notify the Trustees at least 90 days prior to the destruction of any such records or  
 5 documents, and, upon written request by the Trustees, Defendant shall deliver any  
 6 such non-privileged records or documents to the Trustees. Defendant may assert  
 7 that certain documents, records and other information are privileged under the  
 8 attorney-client privilege or any other privilege recognized by federal law. If  
 9 Defendant asserts such a privilege, it shall provide the Plaintiffs with the  
 10 following: (1) the title of the document, record, or information; (2) the date of the  
 11 document, record, or information; (3) the name and title of the author of the  
 12 document, record, or information; (4) the name and title of each addressee and  
 13 recipient; (5) a description of the subject of the document, record, or information;  
 14 and (6) the privilege asserted by Defendant. However, no documents, reports or  
 15 other information created or generated pursuant to the requirements of the  
 16 Consent Decree shall be withheld on the grounds that they are privileged.

17 60. Defendant hereby certifies individually that, to the best of its  
 18 knowledge and belief, after a reasonable inquiry that fully complies with the  
 19 Federal Rules of Civil Procedure, it has not altered, mutilated, discarded,  
 20 destroyed or otherwise disposed of any records, documents or other information  
 21 (other than identical copies) relating to its potential liability regarding the Site  
 22 since notification of potential liability by any Trustee.

### 23 XXIII. NOTICES AND SUBMISSIONS

24 61. Whenever notice is required to be given or a document is required to  
 25 be sent by one Party to another under the terms of this Decree, it will be directed  
 26 to the individuals at the addresses specified below, unless those individuals or  
 27 their successors give notice of a change to the other Parties in writing. Written  
 28

1 notice as specified constitutes complete satisfaction of any written notice  
2 requirement of the Decree for Plaintiffs and Defendant

3 As to the United States and as to DOJ:

4 Chief, Environmental Enforcement Section  
5 Environment and Natural Resources Division  
6 U.S. Department of Justice  
7 P.O. Box 7611  
8 Washington, D.C. 20044-7611  
9 (DJ #90-11-3-07227/1)

10 Michael J. Zevenbergen  
11 U.S. Department of Justice  
12 c/o NOAA/Damage Assessment  
13 7600 Sand Point Way, NE  
14 Seattle, WA 98115

15 As to NOAA:

16 Laurie Lee  
17 NOAA Office of General Counsel  
18 501 W. Ocean Blvd., Suite 4470  
19 Long Beach, CA. 90802

20 As to the United States Department of the Interior:

21 Barry Stein  
22 U.S. Department of the Interior  
23 Office of the Solicitor  
24 805 S.W. Broadway, Suite 600  
25 Portland, OR 97205

1 Jeff Krausmann  
2 U.S. Fish & Wildlife Service  
3 510 Desmond Dr. SE, Suite 102  
4 Lacey, WA 98503-1263

5 As to the State:

6 Craig Thompson  
7 Toxics Cleanup Program  
8 State of Washington  
9 P.O. Box 47600  
10 Olympia, WA 98504-7600

11 As to the Suquamish Tribe:

12 Melody Allen  
13 Suquamish Tribe  
14 Legal Department  
15 P.O. Box 498  
16 Suquamish, WA 98392-0498

17 As to the Muckleshoot Indian Tribe:

18 Mr. Rob Otsea  
19 Office of the Tribal Attorney  
20 Muckleshoot Indian Tribe  
21 39015 172nd Avenue S.E.  
22 Auburn, WA 98002

23 As to Boeing:

24 Steven E. Rusak  
25 The Boeing Company  
26 MC 7A-XP  
27 P.O. Box 3707  
28 Seattle, WA 98124-2207

Mark W. Schneider  
Perkins Coie LLP  
1201 Third Ave., Suite 4800  
Seattle, WA 98101-3099

XXIV. EFFECTIVE DATE

62. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

## XXV. RETENTION OF JURISDICTION

63. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIV (Dispute Resolution) hereof.

## XXVI. INTEGRATION/APPENDICES

64. This Decree and its appendices constitute the final, complete, and exclusive agreement and understanding with respect to the settlement embodied in this Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Decree. The terms “Consent Decree” and “Decree” as used herein include the appendices to this Consent Decree, unless expressly indicated to the contrary. The following appendices are attached to and incorporated into this Consent Decree:

Appendix A Boeing Habitat Project Scope of Work

Appendix B Project Site deed restrictions

## XXVII. MODIFICATION

65. No material modifications shall be made to any requirement under this Consent Decree without written notification to and written approval of the United States Department of Justice and the Trustees, Defendant and the Court. Modifications to this Consent Decree exclusive of the appendices incorporated within that do not materially alter the terms of this Consent Decree may be made by written agreement between the United States Department of Justice, the Trustees and Defendant. Modifications to any of the appendices to this Consent



Decree that do not materially alter any of the terms of this Consent Decree may be made by written agreement between the Trustees and Defendant.

### XXVIII. ENFORCEMENT

66. The requirements of this Consent Decree, including but not limited to deadlines, schedules and Project designs, are independently enforceable. Any delay or failure of the Trustees to enforce any requirement will not preclude or prejudice the subsequent enforcement of the same or another requirement.

### XXIX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

67. This Decree will be lodged with the Court for a period of not less than 30 days for public notice and comment. The Plaintiffs each reserve the right to withdraw or withhold their consent if the comments regarding the Decree disclose facts or considerations that indicate this Decree is inappropriate, improper, or inadequate. Defendant consents to the entry of this Decree without further notice.

68. If for any reason this Court does not approve this Decree in the form presented, this Decree may be voided at the sole discretion of any Party, and the terms of the agreement may not be used as evidence in any litigation among the Parties.

### XXX. TERMINATION

69. When all actions required under Section VII have been taken and all payments required under Sections X, XI, and XII have been made, the parties may move to partially terminate this Consent Decree. Notwithstanding the previous sentence, the following provisions of this Decree shall survive any motion for termination: Paragraphs 20 and 21 of Section VII; Section VIII ("Access to Information and Project Site"); Section XIV ("Dispute Resolution"); Section XVIII ("Covenant Not to Sue by Plaintiffs"); Section XIX ("Reservations of Rights"); Section XX ("Covenant Not To Sue by Defendant"), Section XXI

1 (“Effect of Settlement; Contribution Protection”); and Section XXV (“Retention  
2 of Jurisdiction”).

### 3 XXXI. SIGNATORIES/SERVICE

4 70. The Assistant Attorney General for the Environment and Natural  
5 Resources Division of the United States Department of Justice and each  
6 undersigned representative of the State, the Suquamish Tribe, the Muckleshoot  
7 Indian Tribe and Defendant certifies that he or she is authorized to enter into the  
8 terms and conditions of this Decree and to execute and bind legally the Party that  
9 he or she represents to this document.

10 71. Defendant agrees not to oppose entry of this Decree by this Court or  
11 to challenge any provision of this Decree unless any Plaintiff has notified  
12 Defendant in writing that it no longer supports entry of the Decree.

13 72. Defendant will identify on the attached signature page the name and  
14 address of an agent who is authorized to accept service of process by mail on  
15 behalf of it with respect to all matters relating to this Decree. Defendant agrees to  
16 accept service in that manner and to waive the formal service requirements set  
17 forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local  
18 rules of this Court, including but not limited to service of a summons. Defendant  
19 need not file an answer to the complaint in this action unless or until the Court  
20 expressly declines to enter this Decree.

### 21 XXXII. FINAL JUDGMENT

22 73. Upon approval and entry of this Consent Decree by the Court, this  
23 Consent Decree shall constitute a final judgment between and among the United  
24 States, the State, the Suquamish Tribe, the Muckleshoot Indian Tribe, and  
25 Defendant. The Court finds that there is no just reason for delay and therefore  
26 enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

1 SO ORDERED THIS 14 DAY OF DECEMBER 2010.  
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4 

5 RICARDO S. MARTINEZ  
6 UNITED STATES DISTRICT JUDGE  
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Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE UNITED STATES OF AMERICA:**

Date: \_\_\_\_\_

\_\_\_\_\_  
IGNACIA S. MORENO  
Assistant Attorney General  
Environment & Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. ZEVENBERGEN  
Senior Counsel  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
c/o NOAA Damage Assessment  
7600 Sand Point Way, NE  
Seattle, Washington 98115

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE BOEING COMPANY:**

Date: \_\_\_\_\_

STEVEN SHESTAG  
Director of Enterprise Remediation  
The Boeing Company

Date: \_\_\_\_\_

STEVEN E. RUSAK  
Counsel for Environment, Health and Safety  
Office of the General Counsel  
The Boeing Company

Date: \_\_\_\_\_

MARK W. SCHNEIDER  
Perkins Coie LLP  
1201 Third Ave., Suite 4800  
Seattle, WA 98101-3099

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE STATE OF WASHINGTON:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Ted Sturdevant  
Director  
Department of Ecology

Date: \_\_\_\_\_

\_\_\_\_\_  
Nels Johnson  
Assistant Attorney General  
State of Washington

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE SUQUAMISH TRIBE:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Leonard Forsman  
Chairman  
Suquamish Tribe  
Post Office Box 498  
Suquamish, Washington 98392



Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE MUCKLESHOOT INDIAN TRIBE:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Charlotte Williams  
Chairperson  
Muckleshoot Indian Tribe  
39015 172<sup>nd</sup> Ave. S.E.  
Auburn, WA 98092-9763